

# **Water Pollution Control Advisory Council (WPCAC) Meeting**

**October 18, 2001 9:30 a.m.–11:15 a.m.  
Room 319 Livestock Building**

## **Attendees:**

### **Other Attendees:**

Abe Horpestad, Dept. Environmental Quality (DEQ)  
Tom Reid, DEQ  
John Arrigo, DEQ  
Greg Hallsten, DEQ  
George Algard, Dept. of Agriculture  
Don Allen, WETA

### **Council Members:**

Richard Parks, Fishing Outfitters Association of MT  
Don Halverson, United Assoc. of Plumbers & Pipefitters  
Robert Willems, Conservation Districts  
Don Skaar, Dept. of Fish, Wildlife & Parks  
Roger Noble, Land & Water Consultants  
Mike McLane, Dept. Natural Resources & Conservation

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## **Approval of Minutes**

The WPCAC meeting was called to order by Chairman Richard Parks at 9:30 a.m. The Council approved the minutes from the August 23, 2001 conference call.

## **Water Quality Act (WQA) Proposed Rule Permit Fees/p**

Tom Reid said that the Director Jan Sensibaugh made the decision to go before the Board of Environmental Review (BER) in November to allow additional time for public review and comment. The final tally on the Council's vote regarding the proposed rule permit fee change is three support the change, one supporting with modifications to increase the recreational suction dredge fees, and two were opposed to presenting them to the BER as proposed. A letter will be sent to all permit holders indicating what the existing fees are, what the proposed fees are and a proposed schedule of when to move forward with these proposed rule permit fee changes to allow them to have time to comment before the November BER meeting.

Don Skaar asked what the specific comment on the recreational suction dredge permits was?

Tom Reid said that the concern was the department was not charging enough for the amount of regulation required. It was suggested to raise the annual fee to four hundred dollars and the application fee to three hundred dollars. The department decided to leave both fees at two hundred and fifty dollars to encourage recreational dredge users to be regulated. The department does not have the resources to enforce these permits and relies on Fish, Wildlife and Parks and other federal agencies to discover violators. Due to the small quantity of recreational dredge permits, the department's staff spends little time on them and should not be reflected as an increase in the permit fee in the proposed rule change.

Richard Parks asked if there were any comments concerning the proposed permit fees not being appropriate in relationship to the work required to get the permit completed? Will advertisements for the additional FTE positions occur before or after the proposed rule permit fee are passed?

Tom Reid said that there were no comments in regard to lowering the fees to be appropriate with the permit. In general most industries support an increase in the permit fee if it will mean the permits will be completed sooner. The new positions will not be advertised until the proposed rule permit fee is passed.

### **WQA Administrative Penalty Procedures**

John Arrigo said that in 1997 the board passed administrative rules containing point systems on how penalties are calculated and a process on how to handle the penalty orders. The rules only describe a process addressing statute 75-5-611(1) leaving statute 75-5-611(2) undefined. Thinking this was a statutory problem, the department has attempted legislation the past two sessions that has been unsuccessful. The department is now attempting to clarify the statutes through rules. Under statute 75-5-617(2) it states that unless the alleged violation is an imminent threat to human health or the environment a letter must be sent. This meant that all violations except those that are an imminent threat get a letter and the opportunity to correct the violation without having a penalty assessed regardless the severity of the violation. The following proposed WQA administrative penalties rule changes will allow the department the opportunity to follow the 75-5-611(2) process while being fair and complies with the law. Under 17.30.2003(1) a 75-5-617 notice letter will be sent to all alleged violators except to those that represent an imminent threat. Under 17.30.2003(2) it states that upon determination that a violation has occurred the department may initiate an administrative penalty action. Prior to issuing the penalty order a 75-5-611 letter that states what is required for clean up and what the penalty will be if the corrective action is not taken. The 75-5-611 letter will satisfy the requirements of the 75-5-617 notice letter according to 17.30.2003(4). Under 17.30.2003(5) except as provided in (7) if a violation is corrected no penalty will be assessed. Section six of 17.30.2003 should be deleted because it is redundant with the notices the department must send out in (1) and (2). Under 17.30.2003(7) an administrative penalty order may be issued if the departments actions seeks an administrative penalty for a 75-5-605 violation and is considered a Class I violation as defined in the rules or has a major extent and gravity as described in the rules. This does not require the department to assess a penalty for these types of violations or limit the department's ability to go to court but allows the department to follow the 75-5-611(2) process if it chooses to do so. These changes will allow the department to assess penalties for

serious violations while retaining the corrective action defense for those that are not serious violations. Class I violations include the following: a violation of a department order; discharge of waste that enters state waters without a permit or in a quantity or quality not authorized by a permit unless it is only violated by twenty percent of the permit limit; failure to comply with requirement regarding notification of a violation; a violation of a permit compliance plan or schedule; failure to provide access for inspections; or a violation that causes a major harm or poses a major risk of harm to public health or the environment. A violation has major extent and gravity if the violation has a high likelihood of exposing humans to significant pollution, or is a significant noncompliance in terms of both degree of deviation and length of time.

Richard Parks said that one of the issues that came up concerning this was that this could be used as a fund raising tool. When will this be going before the BER?

John Arrigo said that the administrative penalty procedures could not be used as a fund raising tool. The statute requires all WQA penalty fees to go into the general fund and not to the department. This will not result in higher penalty fees and will still use the same penalty calculation process that was in place when the rules were passed. The proposed penalty rule change is tentatively scheduled to go before the board in January and request permission to initiate rule making. February would be the public review of the proposed rules. During the March board meeting the proposed rule changes could be adopted.

Roger Noble asked how the department would calculate under extent and gravity if a violation represents a high likelihood of exposing humans to significant pollution?

John Arrigo said that it is subjective but the department has to look at how the water is being used or could be used and how harmful the pollution that has been introduced into the water is to human health. If the polluted water eventually goes into a city's water supply or the ground water is polluted in an area where there are wells or could be wells or areas where recreational activities occur would be examples of a high likelihood of exposing humans to significant pollution. The department must treat all similar cases the same to avoid a lawsuit.

Richard Parks said that the process is coherent and easy to understand which is important when it comes to the regulated community and understanding why penalties are or are not being assessed.

### **Coal Bed Methane (CBM) Environmental Impact Statement (EIS)**

Greg Hallsten said that during the course of the summer the agencies have reviewed individual chapters of the EIS and the contractor is currently going through the comments to produce a complete preliminary draft for internal review by the end of the year. A final draft should be out next summer. The Montana Bureau of Mines and Geology is currently creating a 3-D ground water model using existing data on the Upper Tongue River Basin. They will be attempting to get an idea of the draw down impacts on the ground water aquifers due to CBM development and how quickly an aquifer will recharge after CBM development begins. The Montana Bureau of Mines and Geology should be completed with this by December. There is also an air quality model being done for the EIS but it will not be completed until February and will not make it

into the draft EIS. The Northern Cheyenne Tribes have expressed strong feelings to the Bureau of Land Management (BLM) about their treatment in the draft EIS and feel that the Indian trust issues are not being addressed. The Northern Cheyenne Tribes fear that they will not be able to produce CBM on the reservation if the Tongue River is not available for discharging CBM water.

Richard Parks asked if the standards for sodium absorption ratio (SAR) were going to be completed in time to be included in the EIS?

Abe Horpestad said that one issue with the EIS was whether or not it would contain an analysis on how many CBM wells could discharge into the river without violating standards and impacting current uses. The current standards are narrative standards and don't have actual numbers. The department has written up an analysis including numeric values that will be summarized in the EIS and will estimate where the impacts start. These values will be used in the calculations in the EIS to determine limits on SAR and electrical conductivity (EC) and how many CBM wells could discharge without having an impact on the current standards and uses. The waters on the Powder and Little Powder Rivers are naturally high in salinity and increases even more when water flows over salty soils. Farmers have adapted to the naturally high salinity levels and have non-scientific rules on when to irrigate crops. High salinity levels are harmful on crop yields and difficult to leach out of soils. It is difficult to determine exact statistics on what safe levels of salinity are in the water. High sodium ratios in the soil will plug up the soil preventing any water from entering. The allowable SAR is directly related to the salinity of the water. The higher the salinity levels in the water the higher allowable SAR. To be able to accurately determine safe levels in the water that could be turned into standards the department must know how farmers irrigate, what type of crops are grown and when farmers irrigate. There will be public meetings held early in November in Ashland, Broadus, and Miles City. Those who attend will hopefully fill out the questionnaire concerning the source of water, irrigation, soil type, crop type and other information. This information will help determine specific standards. The department had hoped to be able to get the standards adopted by the time the EIS was completed but there have been some complications with the EIS.

Don Halverson asked if discharging the CBM water into the rivers was the easiest way to get rid of it or is there a way to get the contaminants back where it originated from?

Abe Horpestad said that when a permit is written, the permit writers impose effluent limitation guidelines. These are permit limits referred to as the "minimum treatment requirements" which were developed by the Environmental Protection Agency (EPA) and applied nation wide. All permit holders, regardless of impact to the receiving waters, must meet this minimum treatment requirement. There are no effluent limitation guidelines for CBM water. If the effluent limitation guidelines have not been defined, the rules indicate that best professional judgment shall be used to approximate minimum standards. Region Eight EPA has hired a consultant to define what is technically and economically feasible for discharge of CBM waters. Other options of disposing CBM water being looked at include deep injection, injection back into the coal seam at a different location, treating all or enough of water to meet standards and shallow injection. Being that Region Eight EPA is conducting this study and is not being done as part of the national process, the standards produced will not be mandatory for the states. These standards created

will be hard to ignore because of the research by numerous scientists determining “best professional judgment” as stated in the rules. CBM water is also relatively high in bicarbonate ions, which at elevated levels is very harmful to fish.

Don Skaar said that the study done by Montana Fish, Wildlife and Parks would be included in the EIS to help determine what the effects and limits should be using these threshold limits for bicarbonate ions. These bicarbonate values are within the possibility of waters receiving CBM water. There is a possibility of standards being created for bicarbonate ions. The Flathead minnow is more resistant to saline water than other native fish like Northern Pike and may be affected at much lower levels. The study was only for ninety-six hours and it is unknown what long-term effects at low levels would be.

Roger Noble asked if water right permits were required to appropriate water for the CBM developers?

Mike McLane said that Montana decided that CBM water is not being put to actual use and is a waste product of the final results. If there were another way to relieve the pressure and get the methane out developers would use that process. It was decided that since the water was not necessary for the CBM process a water right permit was not required. A water right permit is a permanent right to allow holders to sell, export or do anything else with the water. It does not mean that there may not be harm to other users or eliminate CBM developers from potential damages or lawsuits from affected users. It may be difficult to determine cause and effect of CBM development to other users.

### **Other Business**

Abe Horpestad said that there would be a write up included in the CBM EIS on Total Maximum Daily Loads (TMDL) and how they interface with water quality standards.

Mike McLane asked if the Deep Creek is a flow related TMDL but according to EPA flow related TMDLs are not required, would a TMDL be done?

Abe Horpestad said that it is on the 1996 303(d) list for flow and will probably be removed but that has not happened yet. It should be on the 303(b) list instead for waters that are not up to natural standards but not impaired.

Richard Parks said that a possible agenda item for the next meeting is a general update on the TMDL program. The next meeting is scheduled for December 13, 2001. During the December meeting the council should look at when the BER meetings are to schedule WPCAC meetings for next year.

Richard Parks adjourned the meeting at 11:15 a.m.